APPEAL NO. 021924
FILED SEPTEMBER 18, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 6, 2002. The hearing officer determined that the appellant (carrier) is liable for the cost of spinal surgery. The carrier appeals the determination, asserting that the concurring opinion for spinal surgery is invalid due to irregularities in the second opinion process. The respondent (claimant) did not file a response.

DECISION

Affirmed.

The evidence in this case is undisputed. During the course of treatment for the compensable injury, the claimant's treating doctor, Dr. P referred the claimant to a surgeon, Dr. M for treatment. Dr. M submitted a Recommendation for Spinal Surgery (TWCC-63), recommending cervical discectomy with fusion and instrumentation.[1] The Texas Workers' Compensation Commission (Commission) notified the carrier of Dr. M's recommendation and issued a sublist of second opinion doctors to the carrier on January 10, 2002. The carrier selected Dr. RCP as its second opinion doctor. The claimant submitted to an examination by Dr. RCP on February 7, 2002. On February 14, 2002, Dr. RCP submitted a narrative report wherein he opined that the recommended spinal surgery was not warranted. Upon receipt of Dr. RCP's non-concurrence, the Commission issued a letter, dated February 20, 2002, stating that the claimant failed to notify the Commission of her second opinion doctor within 14 days of notification of the nonconcurrence, and that the recommendation for spinal surgery had, therefore, been automatically withdrawn. The Commission's records do not indicate, however, that the Commission had yet notified the claimant, her treating doctor or surgeon that the carrier selected second opinion examination resulted in nonconcurrence, nor had the Commission yet provided the claimant a sublist of second opinion doctors and procedures for obtaining a second opinion doctor. The claimant was later issued a sublist on February 25, 2002, and an identical sublist on February 26, 2002. On February 26, 2002, the claimant's surgeon, Dr. M, submitted an amended TWCC-63 notifying the Commission of the claimant's selection of a second opinion doctor and the date and time of the appointment. The claimant later learned that her second opinion doctor no longer performed spinal surgery second opinion examinations. Consequently, on March 8, 2002, Dr. M submitted a second amended TWCC-63 notifying the Commission of the claimant's selection of Dr. E as her second opinion doctor.[2] Dr. E concurred in the need for the proposed type of spinal surgery.

[1] The initial recommendation for spinal surgery was submitted prior to January 1, 2002. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206).

[2] The "Statement and Discussion of Evidence" portion of the hearing officer's decision appears to indicate that the second amended TWCC-63 was submitted by Dr. D, assistant surgeon for the recommended spinal surgery. Our review indicates, however, that the second amended TWCC-63 was signed by Dr. M, although accompanied by a cover sheet from Dr. D.

On April 19, 2002, the Commission issued a Result of Spinal Surgery Second Opinion Process letter approving spinal surgery.

As stated above, the carrier asserts that the concurring opinion for spinal surgery is invalid due to irregularities in the second opinion process. The carrier takes the position that the claimant failed to timely notify the Commission of her choice of second opinion doctor, thereby, effectively withdrawing the recommendation for spinal surgery from the second opinion process. In support of its position, the carrier relies on the Commission's Result of Spinal Surgery Second Opinion Process letter dated February 20, 2002, and views the claimant's filing of "amended" TWCC-63s as further indication that the recommendation for spinal surgery had been withdrawn. The carrier argues that in order to reopen the second opinion process the claimant must show a change in condition, and that in the absence of such a showing the Commission erred in allowing the process to go forward. We disagree with the carrier's position.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206) governs the spinal surgery second opinion process. The rule contemplates that selection of the employee's second opinion doctor should be made shortly after the initial TWCC-63 is submitted. If the employee has not already informed the Commission of her selection of a second opinion doctor, however, Rule 133.206(h)(7) sets out procedures whereby the employee has 14 days to do so, after notification from the Commission of a nonconcurrence by the carrier-selected second opinion doctor. It is when the employee fails to meet this 14-day deadline that the recommendation for spinal surgery is automatically withdrawn. The undisputed evidence in this case clearly shows that the claimant's recommendation for spinal surgery was deemed automatically withdrawn before she had the proper opportunity under Rule 133.206(h)(7) to inform the Commission of her selection of a second opinion doctor. Notwithstanding, counting the Commission's letter of February 20, 2002, as notice from the Commission of nonconcurrence, the claimant timely submitted, on February 26, 2002, an amended TWCC-63 informing the Commission of her selection of a second opinion doctor.[3] Accordingly, we do not agree with the carrier that the claimant's recommendation for spinal surgery had been withdrawn or that the Commission erred in allowing the process to go forward.

Next, the carrier asserts that it was error for the Commission to issue the claimant a sublist of second opinion doctors separate and apart from that issued to the carrier. The carrier argues that Rule 133.206 requires that the claimant and carrier choose from the same sublist of second opinion doctors and cites, as support, Texas Workers' Compensation Commission Appeal No. 960899, decided June 24, 1996. The decision in that case addressed the application of Rule 133.206(l), regarding a recommendation for spinal surgery following a change in condition. The Appeals Panel held, in the context of a change of condition, that an employee was not entitled to a new sublist from which to choose a new second opinion doctor, but must return to his

[3] We note that the "amended" TWCC-63s were filed in accordance with the provisions of Rule 133.206(h) for purposes of informing the Commission of the claimant's selection of a second opinion doctor and do not constitute evidence that the second opinion process had been properly closed.

original second opinion doctor for reconsideration of the need for spinal surgery. To be clear, Appeal No. 960899 does not stand for the proposition that the claimant and carrier must choose from the same sublist of second opinion doctors, as asserted by the carrier. Additionally, we are not aware of any such requirement in Rule 133.206.

The carrier also contends that it was error to allow the claimant to change her second opinion doctor to Dr. E. Specifically, the carrier asserts that there is insufficient evidence that the claimant's original second opinion doctor no longer performed spinal surgery evaluations and argues that the selection of Dr. E was not made by an authorized person under Rule 133.206—i.e. the claimant's treating doctor or surgeon. The carrier's argument ignores the undisputed evidence in this case. In view of the evidence, we cannot assign error to the claimant's change of second opinion doctors as asserted by the carrier, nor can we conclude that Dr. E's concurring opinion is invalid.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **TIG PREMIER INSURANCE COMPANY** and the name and address of its registered agent for service of process is

BOB KNOWLES
5205 NORTH O'CONNOR BLVD., W-850
IRVING, TEXAS 75039.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Veronica Lopez
Appeals Judge

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Michael B. McShane
Appeals Judge